

## Promoting labour rights in the global economy: Could the United States' new model trade and investment frameworks advance international labour standards in Bangladesh?

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**Abstract.** *International free-trade or investment agreements offer great potential for improving labour standards. But that potential is far from realized. Compared with earlier models, the strengthened labour provisions of the United States' recent trade agreement with the Republic of Korea mark a definite improvement, but the author questions their effectiveness, not least because the rights they purport to protect are specifically framed (somewhat loosely) in terms of the ILO Declaration of 1998 rather than the fundamental Conventions that underpin it. Enforcement mechanisms are also questionable. He considers what would need to be done to ensure that such agreements genuinely contribute to raising labour standards globally.*

On 28 June 2013, amidst a cacophony of international and national outrage in the wake of the world's biggest industrial accident since Bhopal, United States President Barack Obama made an unprecedented announcement. The United States, he declared, would no longer extend trade privileges to Bangladesh, rebuking it for not adhering to international labour standards and sending a strong message to US retailers operating there which had been apathetic regarding labour conditions (Greenhouse, 2013a; White House, 2013; see also Anner, Bair and Blasi, 2013).<sup>1</sup>

Just two months earlier, the eyes of the international community had been fixed on the heart of Dhaka, where the Rana Plaza building, housing the garment factories of retailers based in the United States and other western

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<sup>1</sup> President Obama announced that pursuant to section 502(d) of the 1974 Trade Act, it was appropriate to suspend Bangladesh's designation as a Generalized System of Preferences (GSP) beneficiary because it had not taken or was not taking steps to afford internationally recognized rights to workers. In order to reflect the suspension of Bangladesh's status as a beneficiary developing country under the GSP, the President determined that it was appropriate to modify general notes 4(a) and 4(b)(i) of the Harmonized Tariff Schedule of the United States.

countries, had collapsed (Yardley, 2013a; see also Anner, Bair and Blasi, 2013). When it did, it simply crumbled, killing 1,129 men, women and their children who had been in day care, while injuring another 2,515 (Harder, 2013; Yardley, 2013a and 2013b; Kabeer and Mahmud, 2004).

In the international race to the bottom, they were the most recent high-profile casualties, this time in the garment industry, which has long profited from disparities between the strict labour standards of the developed countries and the considerably less stringent standards in the developing world. With retailers actively shopping for countries where they could run factories on the back of cheap labour, Bangladesh was able to develop an export economy by luring them in with a surplus of socially and economically oppressed workers, impoverished and desperate for work.

In many ways, the international race to the bottom that led to the Rana Plaza disaster, had been propelled by favourable trade preferences for countries like Bangladesh under the GSP. Bangladesh was indeed one of 125 countries that enjoyed trade preferences with the United States and had been allowed to export nearly 5,000 products duty-free to the United States (Office of the United States Trade Representative, 2013a), which had bought about 25 per cent of its US\$18 billion in annual apparel exports (Greenhouse, 2013a). United States retailers naturally flocked to Bangladesh, contracting with “subs” like Mr Rana to run their factories and hire cheap labour, and easily importing their goods without additional tariffs.

In revoking Bangladesh’s trade preferences, President Obama had hoped to put economic pressure on the country to adopt and adhere to international labour norms, while at the same time putting pressure on American retailers which were operating in the country by restricting their imports. This bold move was largely symbolic, however. Within the context of a robust bilateral relationship, which benefits both countries economically, a comprehensive bilateral trade and investment agreement, requiring both countries to adopt international labour standards, would undoubtedly have been more effective to implement the type of lasting reforms that were needed.<sup>2</sup> Per-

<sup>2</sup> In the interim following the disaster, several “quick fixes” were introduced. On President Obama’s announcement, see “Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh” (“Statement”) at: <http://www.state.gov/r/pa/prs/ps/2013/07/212209.htm>. On 8 July 2013, the EU, Bangladesh and the ILO entered into an agreement for immediate reform, under a compact committing the parties to a number of time-bound actions, including reforming Bangladeshi labour law to strengthen workers’ rights, improving building and fire safety by June 2014 and recruiting 200 additional inspectors by the end of 2013 (see “ILO, EU, Bangladesh government adopt new compact on garment factory safety”, at: [http://www.ilo.org/global/about-the-ilo/activities/all/WCMS\\_217271/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/activities/all/WCMS_217271/lang--en/index.htm)). On 15 July 2013, Bangladesh amended its Labour Act 2006, whose conformity with international labour standards ratified by Bangladesh was then reviewed by the ILO’s supervisory machinery (see “ILO statement on reform of Bangladesh labour law”, at: [http://www.ilo.org/global/about-the-ilo/media-centre/statements-and-speeches/WCMS\\_218067/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/media-centre/statements-and-speeches/WCMS_218067/lang--en/index.htm)). But Human Rights Watch has a negative assessment (see “Bangladesh: Amended labor law falls short”, at: <http://www.hrw.org/news/2013/07/15/bangladesh-amended-labor-law-falls-short>). On 19 July 2013, the United States associated itself with the EU–ILO compact, and it also issued a multi-step Bangladesh Action Plan 2013, listing needed reforms (see the above “Statement”; see also Bolle, 2014) [all links accessed 16 August 2016].

haps in recognition of this reality, in November 2013, moving beyond President Obama's declaration, the United States and Bangladesh entered into a Trade and Investment Cooperation Forum, the first step towards forging such a bilateral agreement (Office of the United States Trade Representative, 2013b).

Against this background, this article analyses emergent US bilateral trade and investment frameworks – specifically, its Model Free Trade Agreement (FTA) and Model Bilateral Investment Treaty (BIT) – with respect to their labour provisions and related enforcement mechanisms, which are likely to be embedded in any United States–Bangladesh FTA or BIT, to determine their efficacy in advancing international labour standards in Bangladesh. Where these frameworks are not found to be fully efficacious in doing so, recommendations to bolster them are provided, including the incorporation of provisions for Corporate Social Responsibility (CSR) and International Framework Agreements (IFAs). Indeed, the article concludes that the United States' emergent bilateral trade and investment frameworks, while advancing labour standards, would not be fully effective in ensuring that Bangladesh adopts and implements international labour standards, because they do not obligate the country to adopt substantive standards that are ultimately enforceable via a clear process accessible to interested third parties. It is therefore recommended that countries be required to adhere to more substantive norms under the frameworks and that the enforcement mechanisms be improved accordingly. In that respect, some provisions of the EU's FTAs offer insights into the relative strengths and weaknesses of the United States' FTAs.

## Emergent model trade and investment frameworks

To counter the international race to the bottom, international norms for workers' rights should inform the prospective United States–Bangladesh FTA or BIT in order to bridge the gap between the two countries' labour standards. However, both the United States and Bangladesh have demonstrated mixed commitment to such norms. The United States has ratified only two of the ILO's eight core Conventions (ILO, 2013b),<sup>3</sup> although it is a Member of the Organization and has approved both the ILO Constitution (ILO, 2013d),<sup>4</sup> which explicitly refers to freedom of association, a core labour standard, and the 1998 Declaration of Fundamental Principles and Rights at Work. Bangladesh, by contrast, has ratified all but one of the core ILO Conventions (ILO,

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<sup>3</sup> Namely, the Abolition of Forced Labour Convention, 1957 (No. 105) (ratified on 25 September 1991) and the Worst Forms of Child Labour Convention, 1999 (No. 182) (ratified on 2 December 1999).

<sup>4</sup> But for a brief hiatus in 1977–80, the United States has been an ILO Member since 1934.

2013a)<sup>5</sup> and has approved the ILO Constitution and Declaration (ILO, 2013c);<sup>6</sup> but it has been widely criticized for failing to enforce its commitments through domestic laws (see ILO, 2013e).

The United States' non-committal stance is reflected in its emergent bilateral trade and investment frameworks, which embed ILO norms ambiguously alongside a tenuous enforcement mechanism, so as to evade any real, substantive commitment. That being said, the United States currently utilizes such standard bilateral trade and investment frameworks for all new FTAs or BITs it negotiates. That these frameworks nonetheless allude to ILO commitments with related enforcement mechanisms is instructive of how a United States–Bangladesh FTA might advance international labour norms. To understand what the United States and Bangladesh will likely be obligated to and how their respective obligations will be enforced, it is thus important to look to the United States' standard trade and investment frameworks.

### *Model free trade agreement*

In 2002, the United States Congress temporarily granted authority to then President George W. Bush, under the Trade Promotion Authority (TPA), to expedite negotiations with other countries to conclude FTAs, on the grounds that higher economic growth could be achieved through freer trade, with Congress simply agreeing to approve or disapprove the agreements without amendment (Office of the United States Trade Representative, 2007). Shortly before the TPA's expiry in 2007, President Bush negotiated FTAs with the Republic of Korea and Peru, but Congress, then controlled by Democrats, refused to bring them up for a vote because of political concerns that the agreements did not effectively temper free trade with fairer trade across social dimensions, including the adoption by both countries of a trade regime that eliminated institutional barriers across all industries and consistent labour standards (Schott, 2010). When the United States, under the Obama Administration, eventually released the Model FTA that was used for the agreements now concluded with the Republic of Korea and Peru – and which is to be used for future FTAs – this represented a step forward in bridging bilateral trade with social dimensions related to labour standards.

### *Model investment treaty*

President Obama created the Model BIT for negotiations with China in an effort to ensure that bilateral investment would promote basic labour standards

<sup>5</sup> Namely, the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (ratified on 22 June 1972); the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) (ratified on 22 June 1972); the Forced Labour Convention, 1930 (No. 29) (ratified on 22 June 1972); the Abolition of Forced Labour Convention, 1957 (No. 105) (ratified on 22 June 1972); the Worst Forms of Child Labour Convention, 1999 (No. 182) (ratified on 12 March 2001); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (ratified on 22 June 1972); and the Equal Remuneration Convention, 1951 (No. 100) (ratified on 28 January 1998). Bangladesh has not ratified the Minimum Age Convention, 1973 (No. 138).

<sup>6</sup> Bangladesh has been an ILO Member since 1972.

(US Department of State, 2012a and 2012b). As part of the United States–China Strategic Economic Dialogue (SED), the two countries agreed to launch BIT negotiations on 18 June 2008.<sup>7</sup> At the SED in July 2013, representatives from the United States, using the Model BIT as a framework, and the Chinese Government announced that the two countries had entered into sustained BIT negotiations, moving from the technical framework to talks on the actual text.<sup>8</sup>

While the model bilateral trade and investment frameworks that emerged from these processes are in many ways similar to previous FTAs and BITs, they differ significantly in two important ways. First, alongside trade obligations, the Model FTA and Model BIT now include labour obligations that incorporate the ILO Declaration. Second, the Model FTA weds bilateral trade to these labour obligations under a new substantive legal procedure and provides for an unprecedented unitary enforcement mechanism for both sets of obligations, whereby trade sanctions may be applied for labour violations.

## Model frameworks' integrated international labour standards

As in previous FTAs concluded by the United States, the labour chapter of its emergent Model FTA obligates each party to “not fail to effectively enforce its labour laws . . . in a manner affecting trade between Parties”.<sup>9</sup> Yet it also differs by requiring each party to

adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up . . . : (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labour; (d) the effective abolition of child labour; and (e) the elimination of discrimination in respect of employment and occupation.<sup>10</sup>

As such, per the text of the Declaration, the United States and its partner would seemingly be obliged to implement a whole array of new labour rights. However, under the Model FTA, the parties' obligations in regard to these rights are sharply curtailed by a crudely placed exculpatory footnote that provides that “the obligations set out in Article 19.2 [i.e. the above],

<sup>7</sup> When President Barack Obama and President Hu Jintao first met in April 2009, the SED was renamed the Strategic and Economic Dialogue to encompass other strategic issues.

<sup>8</sup> For the text of the Model BIT, see <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [accessed 14 July 2016].

<sup>9</sup> See, for example, Chapter 16, particularly Articles 16.2.1(a) and 16.6.7, and Article 20.17.1 of the Dominican Republic–Central America FTA (CAFTA–DR), available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [accessed 16 August 2016]. For an analysis contrasting the Model FTA with the CAFTA–DR in terms of social dimensions, see also Gantz (2007).

<sup>10</sup> See, for example, Article 19.2.1 of the *Free Trade Agreement between the United States of America and the Republic of Korea* (KORUS FTA), available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [accessed 16 August 2016].

as they relate to the ILO, refer only to the ILO Declaration”.<sup>11</sup> This seems to sever the Declaration – which aspires to realize these rights – from the underlying ILO Conventions, which ensure they are substantive rights that may be enforced.

Likewise, under the United States’ 2012 Model BIT, the parties commit to their respective obligations as ILO Members and parties to the ILO Declaration (Article 13.1). They also undertake to uphold their respective domestic laws and not to waiver from them with respect to worker protections via sustained or recurrent action or inaction (Article 13.2). However, as with the Model FTA, the Model BIT does not obligate either party to specific ILO core Conventions (Article 13.3 (a)–(f)).

In other words, in order to understand what the United States and its FTA or BIT partners – in this case Bangladesh – might be obligated to in terms of advancing international labour norms, it is therefore necessary to understand the nature of the obligations flowing from the ILO Declaration versus those imposed by ILO Conventions.

The ILO’s 1998 Declaration on Fundamental Principles and Rights at Work stipulates that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”. Those fundamental rights are enshrined not in the Declaration itself but rather in eight core ILO Conventions (ILO, 1998a), which the 1998 Declaration refers to as Fundamental.<sup>12</sup>

As the ILO Declaration applies universally, while the underlying ILO Conventions do not, both may be integral or both may be separate, depending on the ratification status of individual signatories. In the case of the United States and Bangladesh, the ILO Declaration may be dissociated from the ILO Conventions, because while both countries have adopted the Declaration, neither has ratified the full set of eight core Conventions.

As a result, the relationship between the ILO Declaration and the ILO Conventions is contentious (see Langille, 2005, pp. 424–425).<sup>13</sup> According to the Declaration, its principles derive from the ILO Conventions that form

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<sup>11</sup> Ibid., footnote 1. The ILO’s core Conventions themselves are not expressly referenced in Article 19.2.

<sup>12</sup> The eight Conventions are listed in footnote 5 above. Since the Conventions in question had not yet been widely ratified, the ILO Declaration thus took a radical approach in that it utilized a set of core labour rights to be universally adopted regardless of whether individual signatories had ratified the corresponding Conventions, thereby effectively apoliticizing specific labour rights. To promote universal adoption of the Declaration, its drafters simply alluded to “aspirational” labour rights with vague language rather than institutionalizing substantive ones (Alston, 2004, p. 457).

<sup>13</sup> At the time of the adoption of the Declaration, the Governments of the United States, Chile, Sweden, France and Brazil explicitly stated that “the Declaration referred to adherence to principles and values and not to specific Conventions” (ILO, 1998b, para. 217).

the basis for the ILO fundamental core labour rights, but none of the International Trade Commission members can edify how (see McCrudden and Davies, 2000).<sup>14</sup>

The difference in the legal implications of the obligations emanating from the ILO Declaration versus the Conventions lies in the specificity contained in the latter and the accompanying guidelines as to their proper application and interpretation.

## Model frameworks' enforcement mechanisms

Under the United States' traditional FTAs, a panel would limit the penalty for a breach of labour provisions – typically on labour rights obligations – to an annual monetary payment, capped at US\$15 million, adjusted for inflation, to be paid into a fund jointly administered by both parties for eventual payment to the non-complying party to fund labour initiatives, including efforts to improve labour law enforcement.

The new Model FTA, however, is unique in that its trade and labour regimes are wedded by the integration of labour obligations to the trade obligations: the same general dispute settlement procedures are applicable to both trade and labour disputes. The ability of a party to bring a claim is somewhat curtailed: “To establish a violation of an obligation under Article 19.2.1 a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment” (see footnote 10 above for KORUS FTA, Article 19.2.1, note 2). In the event of such a claim, a panel may grant the prevailing party the right to impose trade sanctions on the non-complying party based on the value of the dispute, rather than just relying on an annual monetary payment. Of course, where a prevailing party does not initially seek trade sanctions, the other party would have the option of paying an annual monetary assessment instead, again, to a jointly controlled fund that doles out the award to the non-complying party to facilitate compliance with the framework.

Adhering strictly to the United States' FTA practice, the emergent model framework provides for two types of dispute settlement procedure, albeit uniformly encompassing disputes over trade and/or labour matters:

<sup>14</sup> A former ILO legal adviser, Francis Maupain, argues that the ILO Declaration and the ILO Conventions provide a fuller understanding of underlying labour rights, noting “[t]here is no danger that the principles and their content will be liberated from the ‘anchor’ of the relevant conventions and ‘painstakingly constructed jurisprudence’ in relation to these rights *for the simple reasons that they are the anchors*” (Maupain, 2005, p. 450). However, the ILO Declaration is still thought to be strongly informed by ILO Conventions, in some circles. Reflecting this point, the ILO legal adviser remarked: “The Declaration contemplated the implementation, not of specific provisions of Conventions, but rather of the principles of those Conventions” (ILO, 1998b, para. 72). According to an AFL-CIO policy statement, the ILO Declaration’s “core labor standards are based on international human rights law” and the relevant ILO Conventions “give content to these core standards” (quoted in Alston, 2004, p. 490).



(1) State–State, applicable to the agreement’s signatories, and (2) Investor–State, applicable to either State’s investors which have investment obligations.<sup>15</sup>

Under the model framework, the scope of the agreement limits the parties’ obligations and subsequently how the parties may pursue a claim is subject to delegated dispute settlement procedures; the scope of these obligations is important to consider when pursuing possible avenues of enforcement (KORUS FTA, Chapter 22).

### *Model FTA State–State dispute settlement mechanism*

Under past US FTAs, consultative agreement provisions have facilitated dialogue between the parties, providing insight into the scope of each party’s obligations and easing the need for the parties to resort to formal dispute settlement mechanisms. In addition, the United States and its FTA partners have had leverage to engage each other in bilateral settlements, because the agreements provided for panels which both parties knew could be used as the next resort. As a result, State–State disputes have been rare, and the United States has had little experience of litigating with other States via this dispute settlement mechanism.<sup>16</sup>

Following the WTO dispute settlement protocol, the new framework, like its FTA predecessors, requires that when a complaining party has a dispute with a defending party: (1) both engage in initial consultations; (2) if consultations fail, the dispute be referred to a panel for review; (3) if the defending party is found to be in violation of an agreement obligation, the dispute settlement panel specify a compliance period; and (4) the complaining party be provided remedies for non-compliance by the defending party (see box 1).<sup>17</sup>

This State–State dispute settlement procedure applies to bilateral disputes involving interpretation of the agreement, including labour provisions, or its application whenever a party considers that (a) the other is undertaking a measure inconsistent with the framework’s obligations, (b) the other party is failing to comply with its obligations, or (c) the other party is acting to nullify or impair normally enumerated benefits that would accrue to it, such as a tariff reduction.

<sup>15</sup> The North American Free Trade Agreement (NAFTA) is unique in containing a third type of dispute settlement, applicable where one NAFTA Party – i.e. the United States, Canada or Mexico – undertakes an anti-dumping or countervailing duty investigation involving the goods of another NAFTA Party. Chapter 19 of the NAFTA permits a Party, either on its own accord or at the request of a private party entitled to domestic judicial review of a final agency determination in a domestic anti-dumping or countervailing duty proceeding, to request that a final agency determination be reviewed by a bi-national arbitral panel instead of by a court in the country in which the determination is rendered. The bi-national panel mechanism was originally included in the now suspended United States–Canada Free Trade Agreement (see <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US> [accessed 17 August 2016]).

<sup>16</sup> Five panel reports were issued under the general dispute settlement provisions of the currently suspended United States–Canada Free Trade Agreement (Chapter 18) during the five years that the agreement was in effect prior to the entry into force of the NAFTA. In the 18 years that the NAFTA has been in force, only three panel reports have been issued under the agreement’s general dispute settlement chapter (Chapter 20).

<sup>17</sup> See KORUS FTA, footnote 10 above, Articles 22.4 et seq.



### Box 1. Model FTA\* dispute settlement mechanism

#### Party consultation

- Complaining party must notify non-complaining party in writing, identifying nature of legal claim and preferred remedy
- Parties have 60 days to arrive at a mutually agreeable solution

#### Joint Committee

- After 60 days, complaining party's complaint is referred to Joint Committee
- Joint Committee must promptly meet with parties to resolve the matter within 60 days by arriving at a mutually agreeable solution
- If Joint Committee does not resolve matter within 60 days, Panel is formed
- Panel consists of a chair, agreed upon by both parties, and two members, one chosen by each party, with the other party having a perfunctory challenge

#### Panel

- Within 180 days of formation, Panel to hear complaint, issue written report with determinations, including any damages
- If a party does not agree to Panel's report, it has 45 days to meet with the other party to draft a mutually agreeable solution
- After 45 days, if no solution, parties may implement Panel's recommendations in whole or in part

\* Consultation is the only recourse for labour issues under the Model BIT, Art. 24.1 a. I(A).

### Model FTA investor–State dispute settlement mechanism

Like previous United States FTAs, the model framework's investment chapter provides for what the United States and its partners are obliged to grant nationals that invest in each other's country, with investors' rights clearly identified as such. Under the model framework, a delegated investor–State dispute settlement mechanism empowers investors to resolve disputes by arbitration (Manyin, 2004).<sup>18</sup>

Under the framework, both countries are obligated to accord investors specific rights, including national and most-favoured nation (MFN) treatment, and to grant foreign investments a minimum standard of treatment or

<sup>18</sup> A United States BIT with the Republic of Korea is still pending (see Bureau of Economic and Business Affairs: *2015 Investment Climate Statement – Republic of Korea*, available at: <http://www.state.gov/e/eb/rls/othr/ics/2015/241618.htm> [accessed 19 September 2016]). The 2012 Model BIT provides for “court” enforcement of that, which preserves the use of the arbitration process. Article 26, section 3, provides that: “Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.” Available at: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [accessed 14 July 2016].

“treatment in accordance with customary international law, including full protection and security”.<sup>19</sup>

Reflecting long-standing United States FTA practice, the framework provides for investor–State dispute settlement, permitting US investors in the other country, and, likewise, the other country’s investors in the United States, to file arbitration claims against the respective countries for violations of their investor obligations, including labour obligations. Under the framework, the investor may pursue such claims against a State at the central level of government and/or the state or local level.

To initiate proceedings against a State, the investor must show that the State has breached an obligation and that the investor has incurred loss or damage from the breach.<sup>20</sup> If another investor is harmed in the breach, if the investor has a controlling interest, it may bring a claim on its behalf as well.<sup>21</sup> In some cases, involving the United States’ and the other country’s financial services institutions, the Investor–State dispute settlement may also be invoked (KORUS FTA, Article 13.1.2).<sup>22</sup>

Unlike the Model FTA, the 2012 Model BIT does not wed investment and labour obligations. Rather, it states that in the event of a dispute – including over the enforcement of labour obligations – one State should notify the other in writing of a request for *consultations*, with the other responding within 30 days, and with both agreeing to work towards a mutually satisfactory resolution.<sup>23</sup>

<sup>19</sup> As is the case with the United States–Peru Trade Promotion Agreement and pending FTAs with Colombia and Panama, the KORUS FTA does not adopt the broad interpretation of “fair and equitable treatment” applied by some early NAFTA arbitral panels and instead expressly provides that treatment must be in accordance with “customary international law”. The agreement also contains an annex stating the Parties’ shared understanding that such law “results from a general and consistent practice of states that they follow from a sense of legal obligation”.

<sup>20</sup> Under Art. 11.28 of the KORUS FTA, an “investor of a Party” is “a Party or a state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality”. With respect to the Republic of Korea, the term “national” is generally defined as “a Korean national within the meaning of the Nationality Act”, provided that “a natural person who is domiciled in the area north of the Military Demarcation Line on the Korean Peninsula shall not be entitled to benefits under this Agreement” (Article 1.4).

<sup>21</sup> Under Article 11.28 of the KORUS FTA an “enterprise of a Party” is “an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there”.

<sup>22</sup> Under the framework, both parties give broad consent for investor claims against them (Articles 11.18.2(a)) and must consent to arbitration in writing (Articles 11.18.2, 11.18.3; Annex 11-E on a separate rule for United States investors). Chapter 11, however, precludes investors (and investors’ enterprises) from maintaining local proceedings and Chapter 11 arbitrations simultaneously except for, in some cases, local proceedings for interim injunctive relief that does not involve the payment of monetary damages.

<sup>23</sup> See Article 13.4 at: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [accessed 14 July 2016]. Article 1 defines “claimant” as “an investor of a Party that is a party to an investment dispute with the other Party”. The parties are not precluded from negotiating an arbitration mechanism.

## Efficacy of the new FTA/BIT frameworks to advance international labour standards in Bangladesh

Without question, the United States' model bilateral trade and investment frameworks are an improvement compared to their predecessors in that they attempt to wed free trade to international labour norms, in an effort to halt the race to the bottom. But the efficacy of these frameworks for advancing international labour standards in Bangladesh, should the two countries conclude an agreement, is imperilled for several reasons. First, while the model frameworks do integrate international labour norms, the ILO commitments they provide for – given the dichotomy of the ILO Declaration versus the ILO Conventions they allude to – are likely to prove insufficiently substantive to be enforceable. Second, given the frameworks' dubious dispute settlement mechanisms for enforcing their labour obligations, it is unclear how they would be enforced. Third, while the Model FTA's dispute settlement mechanisms allow for wedded enforcement of trade and labour obligations, only States and individual investors may bring claims; third parties such as non-governmental organizations, trade unions, other labour groups and/or workers cannot bring similar challenges, thereby limiting enforcement. And fourth, while the model frameworks place an onus on States Parties to enforce labour standards, no such onus is imposed upon companies to adhere to basic corporate social responsibility (CSR) norms in their operations, which means that they can easily evade compliance, through such activities as subcontracting.

The following section analyses the model frameworks with respect to these limitations and how they might impede adoption of international labour standards in Bangladesh.

### *Model frameworks' international labour norms are insufficiently substantive to be enforceable*

Within the model frameworks, both the United States and Bangladesh would be required to adhere to the principles of the ILO Declaration but, as already noted, these principles are ambiguous and may give rise to elastic interpretations. Indeed, commitment to the ILO Declaration by either country could arguably be met by divergent yet equally inadequate domestic measures, making any substantive dispute on such grounds entirely irrelevant.

In the case of Bangladesh, where the families of the Rana Plaza workers need redress, the ILO Declaration would thus afford them no enforceable substantive rights. Should the United States bring a claim against Bangladesh, the latter could counter that it had satisfied its obligations under the Declaration by simply aspiring to conform to ILO standards in its domestic laws, regardless of whether they are in full conformity or not, leaving no recourse. The problem thus centres on this distinction: the extent of the parties' obligations is ambiguous because the meaning of the Declaration, given its vague language, is largely informed by the actual ILO Conventions. And as mentioned above,

while the United States and Bangladesh have both adopted the ILO Declaration, neither has ratified the entire battery of related Conventions.

What is clear, however, is that the United States has made a deliberate effort under the frameworks to sever the ILO Declaration from the ILO Conventions as regards its own obligations (and those of Bangladesh) to wedded trade and labour obligations. While the framework's allusion to both may be evidence of an aspiration on the part of the United States and even Bangladesh to adhere to both one day, any correlation between the two is currently irrelevant because the agreement would relegate each other's commitments to just the Declaration's broad principles, espousing the hope of achieving certain labour rights, which could be interpreted in innumerable ways. In a dispute then, neither the United States nor Bangladesh would have to demonstrate to a panel that its legal regime is safeguarding any substantive rights, but rather that its legal regime aspires to advance such rights, an objective which could be met in many different ways.

### *Model frameworks' enforcement mechanisms inhibit claims*

Even if the extent of the United States' and Bangladesh's commitments to ILO standards were clear, it is unclear as to when a dispute over a violation could even arise under the integrated enforcement mechanisms. Under the Model FTA framework, the United States or Bangladesh could only bring a claim against the other if it failed to "effectively enforce its labour laws ... through a sustained course of action or inaction, in a manner affecting trade or investment" (KORUS FTA, Art. 19.3.1(a)). Given that this language is entirely new, no cases illuminate what constitutes a "sustained course of action or inaction" that affects "trade or investment". Thus, while the framework provides solid State-State and Investor-State dispute mechanisms, it remains elusive how either country could get beyond the enforcement chapter to access them.

Indeed, what the United States, Bangladesh or investors would have to do to establish sustained State failure to enforce domestic laws in line with the labour standards is entirely unknown, and the uncertainty of the language solicits diverse interpretation, which would be likely to prevent a claim from even arising absent a clear, concerted and sustained effort by one party to this end. Should a claim be brought over a case like the Rana Plaza disaster, Bangladesh could easily argue that sustained action is not evidenced by a singular incident.

The Model BIT framework provides no relief either. Here, the United States and Bangladesh would be resigned to consulting with each other when disputes arise, with no meaningful formalized process to obtain a binding judgment should consultations fail. It follows that the United States would only be able to consult with Bangladesh about a situation like Rana Plaza, which would be an entirely voluntary process that may or may not lead to agreed reforms.

### *Model frameworks' enforcement mechanisms exclude interested third-party claims*

Even if the model FTA framework were clearer as to when the United States, Bangladesh or investors could enforce its wedded trade and labour standards via its dispute settlement mechanisms, their scope would be limited because they exclude other interested third parties from bringing these types of claims. As a result, the United States, Bangladesh and investors would have sovereign control over which trade and labour laws will be enforced by their ability to dictate which types of claims will be pursued, leaving companies, non-governmental organizations, unions and workers inept to ensure full compliance by bringing their own claims, even though they are directly affected by non-compliance. In the case of the United States and Bangladesh, this is especially troubling, because both countries may be hesitant to bring a claim against the other, given that both countries' domestic laws are misaligned with ILO standards, exposing them to reciprocal claims.

In an incident like the Rana Plaza, the Model FTA framework, in a great injustice, would provide harmed parties with little recourse. While the United States could theoretically bring a claim against Bangladesh to reform its domestic laws to prevent a similar occurrence, Bangladesh would be immune from any claim from the non-governmental organizations and unions representing the workers and their families or from the workers themselves, denying them much-needed monetary award and other types of assistance to help with loss of consortium or to pay for their loss of work, their care and/or treatment of their injuries. Likewise, the Model BIT framework would only require the United States and Bangladesh to consult with each other and provides no avenue for interested third parties to bring claims.

### *Model frameworks fail to mandate normative corporate social responsibilities*

Finally, while the model frameworks' international labour norms would be obligatory for both the United States and Bangladesh, and require that their domestic laws conform to them, the same norms would not be binding upon companies, such as US retailers and Rana, which are the actual entities transacting business across borders, in the absence of a parallel CSR clause. Rather, under the FTA framework, the United States and Bangladesh would be required to create a cooperative mechanism, under which they would need to develop cooperative measures between the States and corporate bodies and interested parties to facilitate best practices, a process which in and of itself is entirely voluntary (UNEP, 2011).

This means that in an incident like Rana Plaza, while Bangladesh may be subject to some claims, US retailers and Rana, whose unquestionable failure to adhere to basic CSR caused the disaster, would not. For the Rana workers, pursuing a claim against both Bangladesh *and* Rana would open up dual avenues

of recourse. Also, the latter is likely to have deep pockets, would have been in a situation to insure against a workplace incident, and has recognizable and sizeable assets, all of which could be used to settle a claim to provide redress.

## Bolstering the Model FTA/BIT frameworks to advance international labour standards in Bangladesh

Although the United States model trade and investment frameworks are better than their predecessors in terms of advancing international labour norms, they must be strengthened to ensure effectiveness in this respect. The following subsections present several recommendations to that end, which could be used to improve any United States–Bangladesh FTA or BIT and thus assuredly bring international labour standards to the latter (and to the United States).

### *Model frameworks must integrate ILO core labour standards*

While the current model frameworks require signatories to affirm the ILO Declaration, a merely aspirational commitment, it should also require signatories to affirm all of the ILO's fundamental Conventions in order to give that aspiration substance. In a situation like the Rana Plaza disaster, it is unclear what substantive rights if any arise under the Declaration and could therefore be enforced, whereas substantive rights under the Conventions would provide workers and victims' families with a tangible means of redress.

To bolster its model frameworks, the United States need only borrow selected provisions from the European Union (EU) treaties, as an effective model for doing so. As part of the "Global Europe" initiative, the EU has concluded several bilateral trade and investment agreements that have embraced a dual commitment both to the ILO Declaration and to the core ILO labour standards. For example, the EU–Republic of Korea FTA and EU–Peru/Colombia FTA were considered a "stepping stone for the future of globalization" because they tackled tough issues associated with trade while capitalizing on economic ones, and both embrace this model of dual commitment.<sup>24</sup> In addition, the EU and Canada have recently concluded a Comprehensive Economic and Trade Agreement ("CETA") to facilitate their trading relationship, which also commits the parties to the Declaration and core Conventions.

The EU and Canada launched the CETA negotiations in May 2009. By 18 October 2013, they announced that they had reached an agreement in principle, although both parties signalled that the agreement required additional drafting around some remaining contentious issues (European Commission, 2013b). The full consolidated text of the CETA was finally adopted in September 2014.<sup>25</sup>

<sup>24</sup> For a summary of the first of these FTAs, see European Commission (2013a, particularly Chapter 13); on the second, see Fritz (2010); see also European Parliament (2012).

<sup>25</sup> This is available at: [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) [accessed 1 September 2016].

The CETA closely mirrors the EU–Korea FTA, in terms of adopted labour norms. Like the EU–Korea FTA, the EU and Canada have agreed to ensure that their national laws conform to the Declaration and the core ILO labour standards (CETA, Article 23.3(1)).<sup>26</sup> Applicable labour standards also include: the prevention of occupational injuries and illnesses and compensation in case of such injuries and illnesses; acceptable minimum employment standards for wage earners, including those not covered by collective bargaining agreements; and non-discrimination in respect of working conditions for migrant workers. Also like the EU–Korea FTA, the CETA commits the EU and Canada to ratifying additional fundamental ILO Conventions (CETA, Article 23.3(2–4)).<sup>27</sup>

Following the EU framework, the United States’ model frameworks must be bolstered to obligate the contracting parties – in this case the United States *and* Bangladesh – to abide by the Declaration and the ILO’s core labour standards as well as those Conventions proposed by Canada. This foundation would be sufficient to ground a claim by United States against Bangladesh in a more substantive right or, should enforcement mechanisms be extended to interested third parties, to support their claims. In the case of Rana, the United States or, if a reformed enforcement mechanism is in place, interested third parties could bring a claim against Bangladesh for failing to allow Rana workers to bargain collectively for improved working conditions, or for failing to ensure that Rana prevented occupational injury and that it paid compensation for such injury.

### *Model frameworks must adopt easily accessible enforcement mechanisms available to all interested parties*

Whereas the United States’ model trade and investment frameworks, particularly the FTA framework, provide for a powerful enforcement mechanism in terms of wedded trade and labour sanctions, this is also limited: not only is it unclear when States or investors can bring claims, but interested third parties are also excluded from doing so. As mentioned above in connection with the Rana case, it would be hard to show that Bangladesh had a sustained pattern of failing to ensure that its domestic laws conform to ILO standards given the singular event. And, even if this could be established, the United States would be unable to bring a claim to obtain the needed remedies.

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<sup>26</sup> The core ILO labour standards include freedom of association and effective recognition of the right to bargain, the elimination of all forms of compulsory labour, the effective abolition of child labour, and the elimination of discrimination with respect to employment and occupation.

<sup>27</sup> Canada had actually proposed specific Conventions to adopt, including the Minimum Age Convention, 1973 (No. 138), and the Equal Remuneration Convention, 1951 (No. 100). But this proposal was turned down. The EU also rejected a proposal by Canada to include the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), counter-offering to substitute the following language instead: “each party shall ensure that its labour law and practices embody and provide protection for the right to working conditions that respect the health and safety of workers”.



To be more effective, the United States' model frameworks must adopt a clear and easily accessible enforcement mechanism, under which all interested third parties can bring claims, including companies, non-governmental organizations, unions and even workers. To that end, the United States could look to its 1994 NAFTA "side agreement", the North American Agreement on Labor Cooperation (NAALC), or again, to the EU's FTAs for effective models.<sup>28</sup>

Although the EU frameworks' dispute settlement and enforcement mechanisms do not wed trade and labour sanctions, at least the recent CETA with Canada provides a more pliable mechanism, which is clearer and under which all interested parties may bring claims. Unlike the EU–Korea FTA which preceded it, whereby both parties agreed to labour norms without seeking meaningful enforcement provisions, Canada conditioned its acceptance of the labour norms identified under the CETA on the inclusion of language that expressly provides for effective enforcement mechanisms, possibly including monetary awards. As a result, under the CETA there is a bifurcated system whereby parties – including third parties – may bring complaints that labour norms have been violated (CETA, Articles 29.2, 23.5 and 23.11).

The first component, as under the EU–Korea FTA, seems to be ministerial (CETA, Article 29.4). Under this mechanism, should a dispute arise over labour norms, ministerial consultation occurs when either party notifies the other, and if the dispute is not resolved within 45 days it may be referred to an arbitration panel (CETA, Articles 29.6 et seq.). Within 150 days of its establishment, the panel must present to the parties an interim report, including findings of fact and "determinations as to whether the responding Party has conformed with its obligations" under the Agreement (CETA, Article 29.9). Unless the parties agree otherwise, the panel must issue its final, binding report within 30 days of its interim report, whereupon the responding party must, within 20 days, explain "its intentions in respect of compliance" (CETA, Article 29.12). In the event of non-compliance, the requesting party is entitled to suspend its obligations or receive compensation (CETA, Articles 29.14 and 29.15).

The second component of the enforcement system is not found at all in the EU–Korea FTA. This mechanism sets forth a mandatory framework for enforcing each party's domestic labour law, notably by maintaining a system of labour inspection with regard to working conditions and workers' protection and by ensuring that administrative and judicial proceedings are available to persons seeking redress for a breach of domestic labour law. Such proceedings, moreover, must not be unduly costly or protracted, and they must provide

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<sup>28</sup> The text of the NAALC is available at: <https://www.dol.gov/ilab/reports/pdf/naalc.htm> [accessed 17 August 2016]. The United States has not used this model since 1994 when it concluded NAFTA and NAALC, which permitted complaints by aggrieved third parties (for a discussion, see Arthurs, 2001). Yet, while access may be available, it has been criticized because adequate remedies are missing (Zirnite, 1996). Between 1994 and 2006, some 38 complaints were filed, 22 of which were accepted for review. In 2002–05, only seven complaints were filed with only two reviewed, and there were no complaints in 2006–09 (Van Horn, 2011).

injunctive relief and be “fair and equitable”. Also, administrative proceedings must be subject to appellate review, if required (CETA, Article 23.5).

If the United States’ frameworks were to adopt CETA’s regime of enforcement, regardless of whether the United States or investors brought a claim against Bangladesh or Rana, the Rana workers themselves would thus be empowered to bring their own. In doing so, they would have the option of bringing a claim not only before the framework’s established bodies, which could provide a monetary award or even punitive damages as redress, but also to the US or Bangladeshi courts, which could provide the same. And, whether a State brought the claim or the workers did, in accessing these forums, they would not have to deal with the additional burden of proving that Bangladesh failed in a sustained manner to ensure that its domestic laws were in conformity with ILO standards; a singular event would suffice.

*Model frameworks must incorporate international framework agreements with companies, mandating adherence to normative CSR standards*

Finally, the model frameworks place the onus squarely on the contracting parties to advance international labour norms within their domestic laws. This limits their effectiveness because the entities actually transacting across borders are companies – e.g. US retailers and Rana – which are not obliged to ensure that similar standards are adopted in practice. Under the model frameworks as they stand, US companies would thus be able to continue to flout international standards by subcontracting with companies like Rana to run factories, without any imposition to avoid substandard practices (*The Economist*, 2013).

Rather, under the model frameworks, the United States and Bangladesh would only be obliged to consult voluntarily with companies to forge International Framework Agreements (IFAs) or binding agreements that follow normative CSR (Brown, 2012, pp. 273–275). In an attempt to quash international and national concern following the Rana Plaza disaster, the United States and the EU engaged many such IFAs by prodding companies to agree with unions to implement tougher international CSR standards, monitor compliance and provide compensation for the workers, including the Bangladesh Accord,<sup>29</sup> the

<sup>29</sup> On the 2013 Bangladesh Accord on Fire and Building Safety, see <http://www.bangladeshaccord.org>. The Accord is an independent agreement designed to make all garment factories in Bangladesh safe workplaces. It provides independent safety inspections at factories and public reporting of the results of these inspections. Where safety issues are identified, retailers commit to ensuring that repairs are carried out, that sufficient funds are made available to do so, and that workers at these factories continue to be paid a salary. It is a legally binding agreement that has been signed by over 100 apparel corporations from 19 countries in Europe, North America, Asia and Australia; two global trade unions, IndustriALL and UNI; and numerous Bangladeshi unions. Clean Clothes Campaign, Workers’ Rights Consortium, International Labor Rights Forum and Maquila Solidarity Network are non-governmental organization witnesses to the Accord. The ILO acts as the independent chair.

Bangladeshi Alliance,<sup>30</sup> the Bangladeshi Sustainability Compact (European Commission, 2013c), and the Rana Plaza Compensation Fund (Greenhouse, 2013b; Marlin, 2013).

Yet an effective model framework should integrate IFAs that are mandatory and obligate companies to follow international CSR standards *before* a workplace disaster occurs, not after, so as to protect workers from harm. To this end, the United States' current model frameworks – which only provide for a cooperative state mechanism to pursue IFAs with companies on a voluntary basis – must be improved to mandate IFAs for all companies engaged in bilateral business to adhere to strict CSR provisions. After all, as argued in a recent study, “[i]t is not unreasonable to demand, in exchange for the extraordinary protection provided by International Investment Agreements and their investor-state dispute mechanisms, that investors follow certain basic minimum standards of acceptable conduct, such as full disclosure of past practice, conduct of consultations and environmental impact assessments and other widely-practiced expressions of corporate social responsibility” (Cosbey et al., 2004, p. iv; for a full discussion, see Herrnsstadt, 2013).

The post-Rana IFAs that the United States and EU insisted companies conclude with unions to protect workers and provide redress offer an ambitious model to that end. In line with this model, the key characteristics that would need to be integrated into the United States' model frameworks must be (1) that they mandate companies to conclude agreements with identified unions or a collective representative of the workers, (2) that, under these agreements, the parties undertake to adhere to strict CSR provisions, (3) that they monitor enforcement, and (4) that they set up a compensation fund in the event workers are hurt.<sup>31</sup>

As to the first characteristic, the model frameworks simply need to integrate an IFA chapter that would require all US retailers bilaterally transact-

<sup>30</sup> On the 2013 Alliance for Bangladeshi Worker Safety, see <http://www.bangladeshworker-safety.org>. The Alliance was founded by a group of North American apparel companies and retailers and brands which have joined together to develop and launch the Bangladesh Worker Safety Initiative, a binding, five-year undertaking that will be transparent, results-oriented, measurable and verifiable with the intent of improving safety in Bangladeshi ready-made garment factories. Collectively, these Alliance members represent the overwhelming majority of North American imports of garments from Bangladesh, produced at more than 500 factories. The current group of 26 includes the following companies: Ariela-Alpha International; Canadian Tire Corporation, Limited; Carter's Inc.; The Children's Place Retail Stores Inc.; Costco Wholesale Corporation; Fruit of the Loom, Inc.; Gap Inc.; Giant Tiger; Hudson's Bay Company; IFG Corp.; Intradeco Apparel; J.C. Penney Company Inc.; The Jones Group Inc.; Jordache Enterprises, Inc.; The Just Group; Kohl's Department Stores; L.L. Bean Inc.; M. Hidary & Company Inc.; Macy's; Nordstrom Inc.; Public Clothing Company; Sears Holdings Corporation; Target Corporation; VF Corporation; Wal-Mart Stores, Inc.; and YM Inc. Supporting associations include: American Apparel & Footwear Association, BRAC, Canadian Apparel Federation, National Retail Federation, Retail Council of Canada, Retail Industry Leaders Association, and United States Association of Importers of Textiles & Apparel. In addition, Li & Fung, a major Hong Kong-based sourcing company which does business with many members of the Alliance, serves in an advisory capacity.

<sup>31</sup> According to Kytte and Ruggie (2005), multinational CSR involves three components, namely: international standards, monitoring compliance, and hedging risk (see also Stevis, 2010).

ing business across Bangladesh's borders to engage their workers' designated representative – ideally chosen by a majority of the workers within a trade union or some other form of recognized collective representation – to conclude such an agreement. The IFA should be legally binding and enforceable through the frameworks' integrated enforcement mechanisms. Being fully integrated into the model FTA or BIT framework, the IFA could thus be enforced against the company using the mechanisms provided, although it would not provide for redress in other forums as enforceable contractual obligations *per se*. In the case of United States retailers subcontracting to Bangladesh, the subcontractors would then be obliged to work with the unions or the collective representative of their workers. Ideally, should the required IFA fail to be concluded between a company and its unions, the former should be prohibited from importing/exporting its goods or services.

As to the second characteristic, the United States' model frameworks would need to enshrine normative CSR standards that would be binding under the integrated IFAs that result. To this end, the frameworks' IFAs could encompass a wide range of existing international CSR standards, but the OECD Guidelines for Multinational Enterprises, which partly align with the ILO's core Conventions, would best elucidate what workplace standards are best practice.

Adopted on 25 May 2011, the OECD Guidelines are addressed specifically to multinational enterprises, like US retailers and their subcontractors, and draw on internationally recognized standards to establish CSR principles and standards (OECD, 2011, p. 17). In particular, US retailers and their subcontractors would be required to meet the obligations listed in box 2.

As to the third characteristic, the model frameworks would need not only to incorporate the OECD Guidelines that apply to related FTAs, but also to provide for the establishment of a joint taskforce with the union to monitor compliance. To this end, the IFA should require a specific regime of joint compliance measures – to be undertaken by a joint team of company, subcontractor (if applicable) and union representatives – that should include regularly scheduled visits to the workplace to assess among other things the structural integrity of the building, whether the building is fire-ready, and whether occupational safety and health laws, as well as the Guidelines, are being enforced.

Finally, as to the fourth characteristic, the model frameworks would need to ensure that, if the OECD Guidelines are not followed under the integrated IFAs, and a workplace disaster occurs, there is a compensation fund in place to award workers redress, through monetary and/or other means. Ideally, US retailers and their subcontractors should be held to a certain threshold for the fund, with clear procedures for compensating workers should an accident occur; companies could purchase insurance as an alternative to direct funding, if needed, and demonstrate, in lieu of the fund threshold, that they are adequately insured for compliance.

Mandating integrated IFAs with clear CSR standards for all companies and their unions within the United States' model frameworks would be of

## Box 2. OECD Guidelines for Multinational Enterprises

### V. Employment and Industrial Relations

Enterprises should [...]:

1.
  - (a) Respect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organizations of their own choosing.
  - (b) Respect the right of workers employed by the multinational enterprise to have trade unions and representative organizations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment.
  - (c) Contribute to the effective abolition of child labour, and take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.
  - (d) Contribute to the elimination of all forms of forced or compulsory labour and take adequate steps to ensure that forced or compulsory labour does not exist in their operations.
  - (e) Be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status, unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.
2.
  - (a) Provide such facilities to workers' representatives as may be necessary to assist in the development of effective collective agreements.
  - (b) Provide information to workers' representatives which is needed for meaningful negotiations on conditions of employment.
  - (c) Provide information to workers and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
3. Promote consultation and co-operation between employers and workers and their representatives on matters of mutual concern.
4.
  - (a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.
  - (b) When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families.
  - (c) Take adequate steps to ensure occupational health and safety in their operations.
5. In their operations, to the greatest extent practicable, employ local workers and provide training with a view to improving skill levels, in co-operation with worker representatives and, where appropriate, relevant governmental authorities.
6. In considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of the workers in their employment and their organisations, and, where appropriate, to the relevant governmental authorities, and co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.
7. In the context of bona fide negotiations with workers' representatives on conditions of employment, or while workers are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer workers from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.
8. Enable authorised representatives of the workers in their employment to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorized to take decisions on these matters.

Source: OECD, 2011, pp. 35–37.

obvious benefit. The IFA would be a legally enforceable agreement, and if a company failed to abide by the CSR standards, a claim could be brought against it using the frameworks' enforcement mechanisms. In the case of Rana, this would mean that an IFA between US retailers, Rana as a subcontractor, and a trade union could have provided workers with a viable avenue of redress for a claim of violations of safety and health protocols, with guaranteed compensation through the fund. This is of course only equitable since the US retailers along with Rana would have benefited from the trade relationship established under the larger agreement and would have been in the best position to prevent what happened to their workers, by visiting the plant to inspect it, by ensuring that it was ready for an emergency, by checking that basic safety and health protocols were being followed, and by providing the needed insurance.

Of course, the United States would also have to be proactive in working with all of its bilateral trade partners across the developing world to adopt similar trade and investment frameworks lest the international race to the bottom be aggravated by selective FTAs with trading partners like Bangladesh, with companies simply seeking out other countries to operate in where no such agreements impose heightened standards on their practices.

## Conclusion

With the memory of the Rana Plaza disaster and its victims still looming large in our collective conscience, and with Rana workers still seeking justice, the United States should take the opportunity to refine its model trade and investment frameworks to ensure that they are effective in advancing international labour standards in Bangladesh. Rather than the United States simply revoking Bangladesh's trade privileges, a comprehensive bilateral framework is the most realistic way to ensure that Bangladesh and the US companies operating there adhere to stricter labour standards, in the interest of preventing another Rana.

To this end, while the current frameworks do represent an advance in committing the United States to ILO labour standards and in providing for a unitary means of enforcement, wedding trade and labour standards, they must be bolstered to ensure effectiveness. The frameworks must commit signatories not only to the ILO Declaration but also to all the ILO's core labour standards; they must adopt a unitary dispute settlement and enforcement mechanism that is clear and that allows all interested parties to bring a claim; and they must ensure that states, companies and investors alike are all held to the prescribed standards through the inclusion of IFAs and CSR principles.

The United States could thus advance meaningful international trade and labour instruments and move toward avoiding future tragedies such as that which occurred in Bangladesh and providing continuity of existing rights, notwithstanding any legislative changes. Indeed, The "quick-fix" labour law reforms enacted in Bangladesh in the months following the Rana Plaza disaster and within the weeks following the EU-ILO Compact show how quickly laws can be created, and perhaps replaced. This underscores the long-term advantage of an enforceable bilateral treaty providing for labour rights.



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